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Supreme Court of the United States

OCTOBER TERM, 1938.

No. 342.

FRANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, TRUSTEES, CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, A CORPORATION, PETITIONERS,

VS.

SIMONDS-SHIELDS-LONSDALE GRAIN COMPANY, A CORPORATION, RESPONDENT.

RESPONDENT'S BRIEF OPPOSING PETITION FOR CERTIORARI.

M. W. Borders, Jr.,
Dupuy G. Warrick,
Wilfred Wimmell,
Counsel for Respondent.

INDEX

Statement 1

Argument—

I. The requirement of the tariff of a prior arrangement for a specified period of time was an integral essential part of the tariff which was not complied with and could not be waived 6

II. The fact that the respondent shipper received the coopering service without paying the tariff charge is no reason for disregarding the positive provisions of the tariff requiring a prior arrangement for a specified time 10

III. No jurisdictional grounds for review are presented by the petition 14

Conclusion 15

Table of Cases

American Lumber & Export Company vs. Central of Georgia Railway Co., 91 I. C. C. 65 9

American Lumber & Export Co. vs. Central of Georgia Railway Co., 91 I. C. C. 65 12

American Railway Express Co. vs. American Trust Co., 47 F. (2d) 16, cert. den. 284 U. S. 629 ..... 7, 12

Armour Packing Co. vs. United States, 209 U. S. 56, 52 L. Ed. 681 10

Atlantic Bridge Co. vs. Atlantic Coast Line R. R. Co., 36 F. (2d) 163 10

Central West Coal & Lumber Co. vs. Chicago, B. & Q. R. Co., 104 I. C. C. 452 ..... 9, 13

Chesapeake & Ohio R. Co. vs. Westinghouse Church Kerr & Co., 270 U. S. 260, 70 L. Ed. 576 12

Consolidated Lumber Co. vs. Lehigh Valley R. Co., 139 I. C. C. 278 ..... 9, 13

Davis vs. Cornwell, 264 U. S. 560, 68 L. Ed. 848 ..... 7, 10

Davis vs. Henderson, 266 U. S. 92, 69 L. Ed. 182 ..... 7, 8, 9, 12, 14

Georgia F. & A. R. Co. vs. Blish Milling Co., 241 U. S. 190, 60 L. Ed. 948 10

Great Northern Railway Co. vs. Merchants Elevator Co., 259 U. S. 285, 66 L. Ed. 943 13

Great Northern R. Co. vs. Merchants Elevator Co., 259 U. S. 285, 66 L. Ed. 943 13

Gulf, O. & S. Ry. vs. Hefley, 158 U. S. 98 10

K. C. Southern Ry. vs. Albers Com. Co., 223 U. S. 575 10

K. C. Southern Ry. Co. vs. Carl, 227 U. S. 639 10

Keogh vs. Chicago & Northwestern R. Co., 260 U. S. 156, 67 L. Ed. 183 13

Louisville & N. R. Co. vs. Chatters, 279 U. S. 320, 73 L. Ed. 711 7

Louisell Pine & Hardwood Co. vs. Chicago, R. I. & P. Railway, 132 I. C. C. 341 ..... 9, 13

Milne Lumber Co. vs. Michigan Central R. Co., 118 I. C. C. 580 ..... 8, 9, 12-13

Milne Lumber Co. vs. New York Central R. Co., 167 I. C. C. 743 9

National Fire Proofing Co. vs. Bellefonte Central R. Co., 102 I. C. C. 345 ..... 8-9, 13

Penn. R. Co. vs. International Coal Mining Co., 230 U. S. 184, 57 L. Ed. 1446 ..... 10, 13

Republic Coal Co. vs. Chicago, St. Paul Railway Co., 85 I. C. C. 331 ..... 8, 13

Robinson vs. B. & O. R. Co., 224 U. S. 506, 56 L. Ed. 288 13

Southern Pacific Co. vs. Lothrop, 15 F. (2d) 486 10
Southern R. Co. vs. Tift, 206 U. S. 428, 51 L. Ed. 1124 13
Texas & P. R. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553 13
Texas & P. R. Co. vs. Cisco Oil Mill, 204 U. S. 449, 51 L. Ed. 562 13
Union Wire Rope Corporation vs. A., T. & S. F. Ry., 66 F. (2d) 965 10
United States vs. Miller, 223 U. S. 599, 56 L. Ed. 568 13
Updike Grain Co. vs. C. & N. W. Ry., 33 F. (2d) 486 10
VanDusen Harrington Co. vs. Northern Pacific Railway Co., 32 F. (2d) 466, 60 F. (2d) 394 ..... 7, 8, 12
Wabash R. R. vs. Horn, 40 F. (2d) 905 (C. C. A. 7) 14

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VS.

SIMONDS-SHIELDS-LONSDALE GRAIN COMPANY, A CORPORATION, RESPONDENT.

RESPONDENT'S BRIEF OPPOSING PETITION FOR CERTIORARI.

STATEMENT.

Petitioners sued Simonds-Shields-Lonsdale Grain Company, a corporation, respondent herein, to recover $624.00 claimed to be due for services rendered in installing grain doors on 624 cars furnished respondent, under a newly created tariff providing charges of $1.00

per car for services which in the past had been performed by railroad carriers without charge. The tariff included the following provision:

> "The railroad will act as shipper's agent and install grain doors at terminal elevator points specified by law, for a charge of $1.00 per car; prior arrangements for the service to be made with the carriers and to cover a specified period of time."

Three requirements are stipulated in the foregoing tariff: (1) a "prior arrangement"; (2) for a "period of time"; (3) which period of time was to be "specified."

The petitioners requested that respondent make a prior arrangement pursuant with such tariff (Rec. 62, 63). The respondent and other shippers wrote the carriers a letter in which they positively and unequivocally refused to enter into any arrangements with the carriers. This letter, dated July 2, 1935, reads as follows (Rec. 60, 61):

> "The undersigned, being shippers of bulk grain located in Kansas City, Mo.-Kans., hereby notify you, and each of you, that regardless of anything contained in items Nos. 70 and 75 appearing on page 13 of a certain tariff filed for your account by L. E. Kipp, Agent with the Interstate Commerce Commission under No. I. C. C. A-2579, or any other rule or regulation filed with the Interstate Commerce Commission or otherwise, they expect you to continue from and after July 1, 1935, as before said date, to furnish and supply them upon orders for cars to load and ship bulk grain such equipment for said purpose as is suitable safely to carry bulk grain.
>
> "Said undersigned parties further notify you that if ordinary box cars are furnished and sup-

plied upon such orders they will expect them to be fully coopered or prepared with necessary side-door barricades completely installed and ready for loading.

"Said undersigned parties further notify you that regardless of the tariff items, or any other rules or regulations, they decline and will decline to pay any charges whatsoever which may be demanded by you for any work or service involved in making your cars suitable for loading bulk grain, and in particular they decline and will decline to pay any charge for the alleged service of installing or placing grain doors or barricades in cars tendered by you upon order for loading bulk grain.

"Said undersigned parties further notify you that if upon orders as aforesaid cars are furnished and supplied which are not fully coopered with grain doors or barricades in place or which are not otherwise suitable and properly prepared for loading bulk grain such cars will be accepted under protest, and protest is hereby made against each and every such car furnished or which may be furnished upon such orders.

"And said undersigned parties further notify you that if cars are furnished and supplied, contrary to this notice, which necessitate expenditure by said parties, or any of them, for labor or materials in order to install grain doors or barricades, or otherwise to make such cars suitable and properly prepared for loading bulk grain, then in that and every such event said parties will demand reimbursement in full together with interest for each and every such expenditure.

"Said parties hereby request you to acknowledge receipt hereof upon the attached copy by return mail."

In answer to the shippers' letter of July 2, the carriers wrote a letter, dated July 15, 1935, requesting the respondent shipper and other elevator companies to make

"unqualified arrangements pursuant to the terms of the tariff" (Rec. 62, 63).

On November 22, 1935, the respondent shipper wrote the carriers stating that no arrangement with any carrier had been made, and refused to make any arrangements. Payment of bills submitted was refused (Rec. 64). In this letter it was stated (Rec. 64):

> "This tariff became effective on July 1st and we know of no change in the practice of furnishing and installing grain doors from that existing prior to July 1st, the carriers continuing to furnish upon orders for cars to transport bulk grain, cars completely equipped with grain doors and ready for use. We have made no arrangement with any carrier under which such carrier was to install the doors as our agent as contemplated by the tariff above referred to.
>
> "For this reason will you please advise tariff authority for these charges and if the bills were issued under authority of Item 70 W.T.L. Tariff 330 will you please advise how you arrived at the conclusion this item justifies the charge in the absence of any arrangement as contemplated by paragraph (1)?"

To this letter the carriers responded on January 9, 1936, with the astonishing proposition that they had accepted the letter of July 2, 1935, as a "prior arrangement" (Rec. 65).

In reply to this letter, the respondent shipper on January 15, 1936, again denied that it had "made any arrangement with any carrier" (Rec. 66).

The carriers replied to the above letter on March 30, 1936, and in this letter insisted that the tariff regulations

be complied with and asked for the making of definite arrangements and for the period of time such arrangements should be in force. The letter stated (Rec. 68, 69):

> "In order that the tariff regulations may be strictly complied with, you will advise whether you elect to have carriers furnish cars with grain doors or lumber installed, or whether you elect to install grain doors or lumber for your own account.
>
> "In the event you wish carrier to perform the installation service the period of time this arrangement shall be in force shall be specified.
>
> "If you decline to enter into an arrangement, as provided by the tariff, or if you elect to install the grain doors or lumber for your own account, the carrier will furnish cars inspected and O. K.'d for grain loading, but without grain doors or lumber installed."

The respondent shipper made no answer to this last letter (Rec. 92).

During all this correspondence and after it was completed the petitioners and other carriers continued to furnish cars fully coopered with grain doors. It is for coopering these cars during all this time and afterwards that petitioners sued to recover charges of $1.00 per car (Rec. 6-45).

While the carriers, including petitioners, threatened refusal of installation of the grain doors, nevertheless they made the installations, billing the defendant and other shippers at the rate of $1.00 per car. These bills were persistently and immediately returned to the carriers, including petitioners, with the statement that the shippers were not liable for such amounts (Rec. 63, 64).

Upon institution of suit, the trial court and the circuit court of appeals held that there could be no recovery by petitioners, because no prior arrangements were made as required by the tariff and that such provision of the tariff could not be waived.

ARGUMENT.

Petitioners argue four points in support of their petition for writ of certiorari. Their Point B will be answered in the following discussion under Point I. Petitioners' Points A and C are practically the same, and will be answered under Point II. Point D is answered in Point III.

I.

The requirement of the tariff of a prior arrangement for a specified period of time was an integral essential part of the tariff which was not complied with and could not be waived.

The evidence showed that the respondent refused to make a prior arrangement, but insisted that it was the duty of the carrier to install grain doors as a part of its transportation service. It conclusively appeared that there was (1) no "prior arrangement" (2) for any "period of time" (3) "specified" or agreed to in any manner. The trial court found that there was no prior arrangement and the circuit court of appeals agreed with this finding.

Petitioners contend that the only arrangement required by the tariff was a request or demand by the shipper that the carrier act as *his agent* to install grain doors. If so, there was no request that the carrier act as the shipper's agent. Moreover, the tariff required a prior arrangement "to cover a specified period of time." The record shows that these requirements of the tariff were not complied with (Rec. 59-70).

The contention of petitioners that the facts were sufficient to justify a recovery of the charges stated in the tariff is in direct conflict with those decisions holding that provisions like those included in this tariff are an integral part of the tariff which cannot be waived. *Davis* v. *Henderson*, 266 U. S. 92, 69 L. Ed. 182; *Louisville & N. R. Co.* v. *Chatters*, 279 U. S. 320, 73 L. Ed. 711; *Davis* v. *Cornwell*, 264 U. S. 560, 68 L. Ed. 848; *VanDusen Harrington Co.* v. *Northern Pacific Railway Co.*, 32 F. (2d) 466, 60 F. (2d) 394; *American Railway Express Co.* v. *American Trust Co.*, 47 F. (2d) 16, cert. den. 284 U. S. 629.

In *Davis* v. *Henderson*, 266 U. S. 92, 69 L. Ed. 189, the tariff provided that orders for cars for use by shippers of cattle should be in writing. No written notice was given but the station agent had been notified orally. It was contended that since the carrier had notice, it was unnecessary that the notice be in writing. The Supreme Court held that the provision of the tariff requiring that the notice be in writing was an essential part of the tariff which could not be waived. It was said (266 U. S. l. c. 93):

> "The contention is that the rule was waived. It could not be. The transportation service to be performed was that of common carrier under published tariffs. The rule was a part of the tariff. *Georgia, F. & A. R. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 197, 60 L. Ed. 948, 36 Sup. Ct. 541; *Missouri, K. & T. R. Co.* v. *Ward*, 244 U. S. 383, 61 L. Ed. 1213; *Davis* v. *Cornwell*, 264 U. S. 560, 60 L. Ed. 848, 44 Sup. Ct. 410."

Following the Henderson case, the courts have repeatedly held that such provisions as that in the tariff

in question requiring a prior arrangement for a specified period of time cannot be waived, but that such requirements must be strictly complied with. In *VanDusen Harrington Company* v. *Northern Pacific Railway Company, supra*, a tariff required that the railroad give the consignee notice of the location of tracks where cars of grain were being held. By custom this practice was not followed. Subsequently, the carrier sued for charges and the shipper defended that the notice required by the tariff had not been given. The carrier contended that the provision had been waived. The Circuit Court of Appeals of the 8th Circuit, relying upon *Davis* v. *Henderson, supra*, held it could not be waived and said (32 F. (2d) l. c. 470):

> "It is probably true that upon inquiry at the yard office, the consignees could ascertain the location of the hold tracks in North Minneapolis with greater or less delay, but it cannot be denied that the terms of the tariff, which would appear to be conditions precedent to the right to impose these reconsignment charges, were not observed. Such tariffs are construed strictly. The carrier was not compelled to publish its tariff in these precise terms; having done so it must abide by them."

Since the decision of the Supreme Court in *Davis* v. *Henderson, supra*, the Interstate Commerce Commission has repeatedly held that railroad tariffs requiring notices in writing must be strictly complied with and if the notice is not given in writing, a recovery of charges cannot be had *Milne Lumber Co.* v. *Michigan Central R. Co.*, 118 I. C. C. 580; *Republic Coal Co.* v. *Chicago, St. Paul Railway Co.*, 85 I. C. C. 331; *National Fire Proofing Co.* v.

Bellefonte Central R. Co., 102 I. C. C. 345; *Central West Coal & Lumber Co.* v. *Chicago, B. & Q. R. Co.*, 104 I. C. C. 452; *Louisell Pine & Hardwood Co.* v. *Chicago, R. I. & P. Railway*, 132 I. C. C. 341; *Consolidated Lumber Co.* v. *Lehigh Valley R. Co.*, 139 I. C. C. 278. In the Milne Lumber Company case the tariff provided that when carload freight was refused, "notice of such refusal shall be sent by wire to consignor." Such notice was not given, although other notice was given to the consignor. The commission held this insufficient as a basis for demurrage charges and said (l. c. 581):

> "As the shipment was unclaimed, it became the duty of the Grand Trunk on July 12 to send the consignor notice by wire to that effect, as provided by Rule 4, Section E. Such notice was not sent. It is immaterial whether complainant received notice otherwise that the shipment was unclaimed, for the tariff requirement that consignor be advised by wire could not be waived, such notice being a prerequisite to the accrual of demurrage after the expiration of the five days mentioned in Rule 4, Section E-1. *Davis* v. *Henderson*, 266 U. S. 92; *Campbell Construction Co.* v. *L. C. & S. E. Railway Co.*, 95 I. C. C. 603."

Moreover, since the decision in *Davis* v. *Henderson*, *supra*, the commission has held that where the right to freight charges is conditioned upon an agreement between the carrier and shipper, such agreement in the form required by the tariff must be shown. *Milne Lumber Co.* v. *New York Central R. Co.*, 167 I. C. C. 743; *American Lumber & Export Company* v. *Central of Georgia Railway Co.*, 91 I. C. C. 65.

Numerous decisions of this court and the lower federal courts hold that all the provisions of a carrier's tariff must be strictly complied with: cannot be waived and that such tariffs have the effect of a statute. *Penn. R. Co. v. International Coal Mining Co.*, 230 U. S. 184. 57 L. Ed. 1446; *Armour Packing Co. v. United States*, 209 U. S. 56. 52 L. Ed. 681; *Davis v. Cornwell*, 264 U. S. 560. 68 L. Ed. 848; *Georgia F. & A. R. Co. v. Blish Milling Co.*, 241 U. S. 190. 60 L. Ed. 948. It is fundamental that tariff provisions are to be strictly construed and any ambiguous provisions are to be construed favorably to the shipper. *Southern Pacific Co. v. Lothrop*, 15 F. (2d) 486; *Atlantic Bridge Co. v. Atlantic Coast Line R. R. Co.*, 36 F. (2d) 163; *Union Wire Rope Corporation v. A., T. & S. F. Ry.*, 66 F. (2d) 965; *Updike Grain Co. v. C. & N. W. Ry.*, 33 F. (2d) 486; *K. C. Southern Ry. v. Albers Com. Co.*, 223 U. S. 573; *Gulf, O. & S. Ry. v. Hefley*, 158 U. S. 98; *K. C. Southern Ry. Co. v. Carl*, 227 U. S. 639.

II.

The fact that the respondent shipper received the coopering service without paying the tariff charge is no reason for disregarding the positive provisions of the tariff requiring a prior arrangement for a specified time.

Up to the time the carriers established the tariff in question they had always installed grain doors in Kansas City at their expense (Rec. 102). The essence of petitioners' appeal to this court is that to deny petitioners the recovery sought would be to permit unlawful discrimination. Under Point A it is urged that the performance of the service by the carrier without charge would

constitute unlawful discrimination and on page 18 of petitioners' brief it is stated:

> "Since under the tariff plaintiff carrier could perform the service of installation of grain doors only as the agent of the shipper, and at a specific charge in addition to the other freight charges, to permit the shipper to receive the benefit of the installation by the carrier without requiring the shipper to pay the charge, necessarily would be to permit unlawful discrimination under the Interstate Commerce Act which requires uniform payment of all tariff charges, 49 U. S. C. A., Sections 2, 6 (7), 10 (1) (2) (4) and prohibits preference or discrimination in any form or by any device, 49 U. S. C. A., Section 41 (1) quoted in Appendix, post."

Point C (p. 22) presents the same argument. Petitioners cite a great number of cases, but all of these are decisions where the courts upheld all the requirements of tariffs in order to prevent discrimination. Contrary to these cases, petitioners seek to disregard essential provisions of the tariff in order to charge a shipper amounts stipulated as charges in the tariff. The cases relied upon by petitioners show that unlawful discrimination lies in a departure from tariffs rather than an adherence thereto. Petitioners seek to justify a failure to comply with a tariff by cases holding that such tariffs must be complied with.

The conclusive answer to petitioners' argument is that it has been repeatedly held that a carrier cannot recover where the tariff has not been strictly complied with, even though the shipper is benefited. In other words, it cannot be urged as a basis for ignoring tariff requirements that if it is not done benefits will accrue in

favor of a shipper. *Chesapeake & Ohio R. Co.* v. *Westinghouse Church Kerr & Co.*, 270 U. S. 260, 70 L. Ed. 576; *VanDusen Harrington* v. *Northern Pacific Railway Co.*, 32 F. (2d) 466; *American Railway Express Co.* v. *American Trust Co.*, 47 F. (2d) 16, cert. den. 284 U. S. 629.

In *Chesapeake & Ohio Railway Co.* v. *Westinghouse Church Kerr & Co.*, *supra*, a carrier performed services for which it was not entitled to recover under the provisions of the applicable tariff. The carrier claimed that the shipper had secured the benefit of transportation service for which it should be compelled to pay, otherwise it would be receiving discriminations which should not be permitted. This court held that nevertheless a recovery could not be had which was not permitted and authorized by an applicable tariff.

In the *VanDusen Case*, *supra*, the railroad failed to comply with the requirement of a tariff that notice should be given as to the location of certain cars. It was held that having failed to live up to the letter of the tariff, it could not recover reconsignment charges, even though the shipper was benefited by the haul.

Following the decision of this court in *Davis* v. *Henderson*, *supra*, the Interstate Commerce Commission has repeatedly held that in order to be entitled to recover its charges, tariff provisions must be strictly complied with and the fact that a shipper is benefited will not justify recovery where a required agreement or notice has not been had in the manner required by the tariff. *American Lumber & Export Co.* v. *Central of Georgia Railway Co.*, 91 I. C. C. 65; *Milne Lumber Co.* v. *Michigan*

Central R. Co., 118 I. C. C. 580; *Republic Coal Co.* v. *Chicago St. Paul Railway Co.*, 85 I. C. C. 331; *National Fire Proofing Co.* v. *Bellefonte Central R. Co.*, 102 I. C. C. 345; *Central West Coal & Lumber Co.* v. *Chicago, B. & Q. R. Co.*, 104 I. C. C. 452; *Louisell Pine & Hardwood Co.* v. *Chicago, R. I. & P. Railway*, 132 I. C. C. 341; *Consolidated Lumber Co.* v. *Lehigh Valley R. Co.*, 139 I. C. C. 278.

Any tariff, although it is discriminatory or contains technical requirements which make it difficult for the carrier to show performance, is nevertheless effective and has the force of law until changed in the proper manner. *United States* v. *Miller*, 223 U. S. 599, 56 L. Ed. 568; *Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 66 L. Ed. 943.

So long as a tariff remains operative, all its provisions are binding upon shipper and carrier alike; the shipper cannot recover charges paid on the ground that they were unreasonable or discriminatory, nor can the carrier, without strict compliance with the tariff, recover its charges on the ground that failure to permit recovery would result in a rebate or discrimination. *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553; *Texas & P. R. Co.* v. *Cisco Oil Mill*, 204 U. S. 449, 51 L. Ed. 562; *Southern R. Co.* v. *Tift*, 206 U. S. 428, 51 L. Ed. 1124; *Robinson* v. *B. & O. R. Co.*, 224 U. S. 506, 56 L. Ed. 288; *Penn. R. Co* v. *International Coal Mining Co.*, 230 U. S. 184, 57 L. Ed. 1446; *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 66 L. Ed. 943; *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U. S. 156, 67 L. Ed. 183.

III.

No jurisdictional grounds for review are presented by the petition.

The petition does not present any question of unsettled general law. This case involves simply the construction of a tariff and the trial and circuit courts applied rules settled and established by decisions of this court. The decision of this court in *Davis* v. *Henderson*, 266 U. S. 92, 69 L. Ed. 182, not only supports the opinion of the circuit court, but necessitates the conclusions reached by both the trial court and the court of appeals. Since that decision it is settled that all the provisions in a tariff must be strictly complied with and that such provisions cannot be waived. Moreover, the courts have repeatedly held that ambiguous tariffs must be construed favorably to shippers. No new proposition or point of law is involved in the opinion of the court of appeals.

The decision of the court of appeals is not in conflict with decisions of other circuit courts or with decisions of this court. In claiming a conflict among the circuit courts petitioners rely on *Wabash R. R.* v. *Horn*, 40 F. (2d) 905 (C. C. A. 7). In this case it was held that one who became the owner of a car of goods in transit was liable for freight charges, although he directs that the charges follow the car. The reason for this holding was because the bill of lading so provided and the court simply held that in view of that circumstance such person was liable. This case merely requires an adherence to the tariff which is exactly what the trial and circuit courts held in the instant case.

Similarly, the other cases relied upon by petitioners are cases where the courts required strict adherence to tariff provisions and refused to permit waivers, agreements or discriminations conflicting with such tariffs to destroy their force and effect. None of these cases support the point urged by petitioners that the tariff in the instant case should not be strictly construed in order to permit petitioners to have a recovery in the face of explicit provisions in the tariff which have not been complied with.

Many of the cases cited by petitioners support the rule that where erroneous charges have been collected, the carriers are nevertheless entitled to recover the full charges allowed by the tariff despite agreements, representations and estoppels to the contrary. These are cases where the tariffs are strictly complied with and the courts simply hold that such tariffs must be adhered to. None of these decisions support the points upon which petitioners pray that this court grant a writ of certiorari.

Conclusion.

We respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted.

M. W. Borders, Jr.,
Dupuy G. Warrick,
Wilfred Wimmell,
Counsel for Respondent.